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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF ALASKA**  
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9 **Cook Inlet Energy, LLC,**

10 **Plaintiff,**

11 **vs.**

12 **Cudd Pressure Control, Inc.**  
13 **and RPC, Inc.,**

14 **Defendants.**

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) **3:13-cv-00062 JWS**  
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) **ORDER AND OPINION**  
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) **[Re: Motion at docket 33]**  
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16 **Cudd Pressure Control, Inc.,**

17 **Counter-Claimant,**

18 **vs.**

19 **Cook Inlet Energy, LLC,**

20 **Counter-Defendant.**

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23 **I. MOTION PRESENTED**

24 At docket 33, plaintiff Cook Inlet Energy, LLC (“CIE”) moves pursuant to Rule 37  
25 to compel defendant Cudd Pressure Control, Inc. (“Cudd”) to produce documents with a  
26 supporting memo at docket 34. A certificate of good faith is at docket 35. Cudd  
27 opposes at docket 39. CIE replies at docket 49. Neither party requests oral argument.  
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## **II. BACKGROUND**

CIE operates an offshore oil platform in Alaska known as the Osprey Platform ("Osprey"). In 2011, CIE contracted with Cudd for the provision of certain equipment and services for the Osprey. Cudd did provide equipment and perform services on the Osprey, but the parties differ sharply on the adequacy of Cudd's performance. CIE alleges that the equipment Cudd brought to the Osprey was inadequate and that the personnel Cudd employed lacked the ability to satisfactorily perform the services required. CIE alleges that these deficiencies caused it to experience damages consisting of extra costs and delay. For its part, Cudd alleges that it performed as required by the contract and that CIE has wrongfully refused to pay for Cudd's work.

In its First Amended Complaint, CIE seeks a declaration that CIE owes no more to Cudd. It also pleads claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation. Beyond the declaration, CIE seeks an award of damages exceeding \$75,000. Defendants' deny that CIE is entitled to any relief. Cudd's counterclaim pleads claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment (quantum meruit). Cudd asks the court to award it damages in excess of \$1,888,766.

## **III. DISCUSSION**

### **A. Documents at Issue**

CIE asks the court to require Cudd to produce two things:

1. The April 26, 2012 document authored by James Wurst and sent to Bobby Bray analyzing "slow trip times" and/or "down time" while Cudd was present and working on the CIE Osprey Platform.

1 2. Unredacted copies of those portions of Cudd's monthly Problem  
2 Account Reports and Doubtful Accounts Analysis that relate directly to  
3 Cudd's work for, and billings to, CIE, that are directly at issue in this case.<sup>1</sup>

4 The parties disagree with respect to two aspects of the documents sought. First, they  
5 disagree as whether the materials fall within the scope of discovery defined by  
6 Rule 26(b)(1). Second, assuming the documents fall within the ambit of Rule 26(b)(1),  
7 they disagree as to whether the materials are protected by the work-product doctrine.

8 **B. Rule 26(b)(1)**

9 The scope of discovery laid out in Rule 26(b)(1) extends to "any nonprivileged  
10 matter that is relevant to any party's claim or defense . . . ." Rule 26(b)(1) adds that for  
11 information to be relevant, it "need not be admissible at the trial if the discovery appears  
12 reasonably calculated to lead to the discovery of admissible evidence."

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14 Turning first to the April 26, 2012 document authored by James Wurst ("Wurst  
15 Analysis") the court agrees with CIE that it concerns topics that lie at the heart of the  
16 parties' dispute, Cudd's work on the Osprey. Cudd's contention that the Wurst Analysis  
17 falls outside the scope of discovery is based on the proposition that it is "a back of the  
18 envelope review of the opposing party's own documents [which] contains no  
19 independent facts, and no significant analysis."<sup>2</sup> Cudd goes on to point out that  
20 whether trip times were too long and down time excessive will turn on "an analysis of  
21 the events that occurred . . . and expert evaluation of those events."<sup>3</sup> Yet, as amply  
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25 <sup>1</sup>Doc. 34 at p. 3 (parenthetical and bracketed material omitted).

26 <sup>2</sup>Doc. 39 at p. 2.

27 <sup>3</sup>*Id.* at p. 7.

1 demonstrated by CIE's recitation of the various different descriptions of Wurst's work  
2 ventured by Cudd at other times or in other documents,<sup>4</sup> there is good reason to believe  
3 the Wurst Analysis is much more than a simple review of no consequence. While  
4 Wurst may not be an expert, he is the person Cudd trusted to evaluate CIE documents  
5 that are clearly relevant to the dispute. Seeing which he chose to focus upon, how he  
6 analyzed them, what inadequacies or inaccuracies he found in the CIE documents, and  
7 what, if anything, else he related or connected to particular CIE documents (which could  
8 include Cudd documents, statements by CIE or Cudd personnel or other matters) is  
9 reasonably calculated to lead to the discovery of admissible evidence. The Wurst  
10 Analysis falls within the scope of discovery established by Rule 26(b)(1), unless it is  
11 privileged—an issue considered in Subsection C. below.

14 The second set of materials CIE seeks consists of unredacted copies of Cudd's  
15 Problem Accounts and Doubtful Accounts Analysis ("Reports").<sup>5</sup> Cudd asserts, and a  
16 review of the unredacted portions confirms, that these are internal documents meant to  
17 address credit and payment problems related to various billings or accounts receivable  
18 sent or held by Cudd and several related entities. Further, it appears that among the  
19 redacted materials are internal communications about the terms upon which some of  
20 the disputes relating to the billings and accounts receivable could be compromised.  
21 Given both parties' descriptions of what this lawsuit is actually about, the court finds that  
22 production of the Reports is not reasonably calculated to lead to the discovery of  
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26 <sup>4</sup>Doc. 49 at pp. 7-9.

27 <sup>5</sup>The redacted reports produced by Cudd are found at dockets 34-5 and 34-6.

admissible evidence. The Reports fall outside the scope of discovery established by Rule 26(b)(1). Cudd will not be ordered to produce them.

### **C. Rule 26(b)(3)**

“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation for trial by or for another party.”<sup>6</sup> CIE argues that the Wurst Analysis was not prepared in anticipation of litigation. Cudd espouses a contrary view. Cudd bears the burden of establishing that the Wurst Analysis was prepared in anticipation of litigation.<sup>7</sup>

CIE says the Wurst Analysis was attached to an email dated April 26, 2013.<sup>8</sup> Cudd does not contend otherwise; it says the document was created within a year of the filing of CIE’s complaint.<sup>9</sup> CIE’s original complaint was filed on April 4, 2013.<sup>10</sup> CIE’s complaint followed a letter from Cudd dated March 15, 2013, in which Cudd threatened to sue CIE if it did not pay within 30 days.<sup>11</sup>

The Ninth Circuit adopted the “because of” test for deciding whether a document falls within the scope of Rule 26(b)(3) in *In Re Grand Jury Subpoena*,<sup>12</sup> a case cited and

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<sup>6</sup>Fed. R. Civ. P. 26(b)(3)(A).

<sup>7</sup>*Hernandez v. Tanninen*, 604 F.3d 1095, 1102 (9th Cir. 2010) (recognizing burden is on party invoking work product doctrine); *Pacific Fisheries, Inc. v. United States*, 539 F.3d 1143, 1146 (9th Cir. 2008) (same).

<sup>8</sup>Doc. 34-2 at 4.

<sup>9</sup>Doc. 39 at 13.

<sup>10</sup>Doc. 1.

<sup>11</sup>Doc. 1-1.

<sup>12</sup>357 F.3d 900, 907 (9th Cir. 2004),

1 relied upon by both parties. There, Ponderosa Paint Manufacturing, Inc. (“Ponderosa”)  
2 learned that it was under government investigation concerning its transportation and  
3 disposal of hazardous materials. Ponderosa hired a lawyer to advise it and to defend it  
4 in the criminal and civil litigation which it anticipated would result from the investigation.  
5 The lawyer in turn hired an assistant named Torf to help the lawyer prepare to defend  
6 Ponderosa. Torf was engaged to interview witnesses, sample and test products, and  
7 examine properties that might have been exposed to hazardous waste.  
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9 Torf received subpoenas from a grand jury covering all of the documents  
10 prepared in the course of his work for Ponderosa’s lawyer. The Ninth Circuit found that  
11 all of the documents at issue were prepared in anticipation of litigation, but some of  
12 them—the “dual purpose” documents—were also prepared to comply with certain  
13 obligations imposed on Ponderosa pursuant to statute and a consent decree. The  
14 Ninth Circuit held that the “dual purpose” documents were “entitled to work product  
15 protection because, taking into account the facts surrounding their creation, their  
16 litigation purpose so permeates any non-litigation purpose that the two purposes cannot  
17 be discretely separated from the factual nexus as a whole.”<sup>13</sup>  
18

19 The Wurst Analysis was not created by a lawyer preparing to defend Cudd, or  
20 someone engaged to assist a lawyer preparing to defend Cudd. It was created by a  
21 Cudd employee named Wurst at the request of another Cudd employee named Bray  
22 who “wanted a second set of eyes [to] look at the records and assist him in  
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27 <sup>13</sup>*Id.*, 357 F.3d at 909.

1 understanding CIE's claim."<sup>14</sup> Bray had been engaged in attempting to negotiate a  
2 resolution with CIE and was motivated to seek Wurst's help because he was "getting  
3 heat on my end to get this resolved."<sup>15</sup>

4 While it is evident now that CIE and Cudd were on a collision course that would  
5 end in litigation, the record does not disclose any mention of litigation until after the  
6 Wurst Analysis had been completed. Cudd's attempt to establish that the Wurst  
7 Analysis was a "dual purpose" document entitled to work product protection under the  
8 teaching of *In re Grand Jury Subpoena* fails because at the time of its creation, the  
9 Wurst Analysis was a single-purpose document whose purpose was to aid Bray in his  
10 negotiations with CIE. Cudd cannot retroactively alter the purpose of the document.

#### 13 **D. Rule 37 Expenses**

14 CIE asks for an award of its expenses associated with bringing the motion to  
15 compel.<sup>16</sup> When a motion to compel is granted, Rule 37 requires the court to award the  
16 movant reasonable expenses.<sup>17</sup> However, when as here, a motion to compel is granted  
17 in part and denied in part, the court is not obligated to make an award. Rather, the  
18 court *may* apportion the expenses.<sup>18</sup> With due consideration for the outcome of the  
19 motion, the court exercises its discretion not to award either party any portion of the  
20 expenses it incurred.

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22 <sup>14</sup>Doc. 39 at 6.

23 <sup>15</sup>*Id.* at 5.

24 <sup>16</sup>Doc. 33-1.

25 <sup>17</sup>Fed. R. Civ. P. 37(a)(5)(A).

26 <sup>18</sup>Fed. R. Civ. P. 37(a)(5)(C).

1 **V. CONCLUSION**

2 For the reasons set out above, the motion at docket 33 is GRANTED in part and  
3 DENIED in part as follows: Defendant Cudd shall provide a copy of the Wurst Analysis  
4 to counsel for plaintiff CIE within 14 days from the date of this order.  
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6 DATED this 27<sup>th</sup> day of June 2014.

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8 /S/ JOHN W. SEDWICK  
9 SENIOR UNITED STATES DISTRICT JUDGE  
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